LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 30 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1013

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID T. GOLDSTICK
Counsel for Petitioner
10 East 40th Street
New York, New York 10016

HALPERIN, SOMERS & GOLDSTICK

JOHN S. MARTIN, JR.
10 East 40th Street
New York, New York 10016

Of Counsel

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	10
APPENDIX A—Opinion Below	A1
APPENDIX B—Judgment of the Court of Appeals	A6
APPENDIX C—Southern District of New York Calendar Rules	A7

TABLE OF AUTHORITIES

Cases:

Davis v. United Fruit Company, 402 F.2d 328	4
Guardian Assurance Company of London v. Quintant, 227 U. S. 100	8
Hintz v. Beto, 379 F. 2d 937 (C. A. 5)	9
Ungar v. Sarafite, 376 U. S. 575	9
Valdes v. Central Altagarcia, Inc., 225 U. S. 58	8

Other Authorities:

Throckmorton, *Mutual Problems of Physicians and Lawyers in the Presentation of Modical Testimony,* 1965 Proceedings, ABA Section of Insurance, Negligence and Compensation Law 363	6
Federal Rules of Civil Procedure, Rule 26(d)	9

IN THE

Supreme Court of the United States

October Term, 1969

No. .....

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES C. WINSTON, by his attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered on September 3, 1969. An order extending time to file Petition for Writ of Certiorari to and including January 2, 1970 was entered November 28, 1969.

Opinion Below

The opinion of the Court of Appeals (App. A, pp. A1 to A5, *infra*, is reported at 415 F.2d 619.

Jurisdiction

The judgment of the Court of Appeals (App. B *infra*, p. A6) was entered on September 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Whether it constitutes a serious abuse of discretion to force an injured seaman to submit his action for damages for personal injuries to the jury without the aid of necessary medical expert testimony because the doctor who was to testify could not be in court on the afternoon the trial began and to refuse to grant even a five-minute continuance to permit counsel to call the doctor to determine if he could come to court immediately.

Statement

Petitioner James C. Winston lost his sense of taste and his sense of smell after having been exposed to hydrochloric acid fumes while serving as an unlicensed Junior Engineer aboard respondent's vessel, the SS. ADELBORO VICTORY. On October 30, 1963, petitioner and his superior, the First Assistant Engineer, Mr. Hazel, has used hydrochloric acid to clean evaporators in the ship's engine room. On the following day petitioner reported to the ship's Chief Officer, complaining about his eyes. When the ship arrived in Norfolk, Virginia, on November 12, 1963, petitioner immediately went to the United States Public Health Service, where he received treatment from November 15, 1963, to June 4,

1964. His condition was diagnosed at the Public Health Service as: "Loss of taste and smell, etiology unknown, possibly secondary to acid exposure."

Alleging that his injuries were sustained as a result of the negligence of respondent and the unseaworthiness of the vessel in that he had not been provided with a proper mask to prevent inhalation of the acid fumes, petitioner instituted this action for damages in the United States District Court for the Southern District of New York in February, 1966. In a pre-trial order entered in February, 1968, each of the parties indicated that it would require one day for the presentation of its case and respondent indicated that it would present testimony from four witnesses. The pre-trial conference was held before Judge Bonsal on Januray 26, 1968. The case appeared on the No. 1 Calendar on October 1, 1968, New York Law Journal, Vol. 160, No. 65, Page 20 in position #90. The final settlement conference was held before Judge Pollack on October 16, 1968, on which date the case was #69 on the Ready Day Calendar. On October 18, 1968, the case appeared in the Ready Day Calendar in position #40, N.Y.L.J., Vol. 160, No. 78, p. 71, col. 7.

On October 23, 1968 the attorneys for the respective parties received a telephone call from the Clerk of the Court that the case could go to trial the following afternoon, and the attorneys were informed to have their witnesses ready. The Clerk again telephoned counsel later in the day and informed them that they would definitely go to trial the following afternoon and that they should then be ready to proceed.

Petitioner's counsel immediately called Dr. Donald Weissman, a medical doctor who had previously examined petitioner and whose testimony was essential to establish the casual relationship between petitioner's loss of taste and smell and the exposure to hydrochloric acid. Dr. Weissman advised counsel that he had patients scheduled for his office from 9:00 a.m. to 7:00 p.m. the following day, Thursday, but that he would be free to come to Court at 1:30 Friday afternoon.

When the case was called for trial at 2:15 p.m. on Thursday, October 24, 1968, petitioner's counsel advised the Court that petitioner's medical expert would be available the following afternoon at 1:30 p.m. He requested that, if the petitioner's other evidence concluded before that time, he be allowed to bring the doctor in for testimony at 1:30 the following afternoon. The trial judge denied the request and the case proceeded to trial.

Because petitioner and his superior, Mr. Hazel, were both at sea at the time of trial, petitioner's counsel read their depositions to the jury. This procedure was necessitated by the rule in effect in the Second Circuit which requires counsel in a seaman's case to proceed on the plaintiff's deposition if the plaintiff is at sea when the case is called for trial. *Davis* v. *United Fruit Company*, 402 F.2d 328. Counsel then read into evidence portions of a pre-trial stipulation and introduced two exhibits without objection. Having produced all of his evidence other than the testimony of the medical expert on causation, petitioner's counsel advised the court:

"Your Honor, at this time the plaintiff has completed his case except for its medical witness, Dr. Don-

ald Weissman, who is available for testimony at 1:30 tomorrow afternoon.

"The Court: He is too late. Have you got any other witnesses?

"Mr. Goldstick: No, your Honor.

"The Court: Do you rest?

"Mr. Goldstick: No. May I have a five-minute adjournment to see if I can get the doctor to come down at this time?

"The Court: We are not waiting for the doctor. You cannot keep all these people waiting.

"Mr. Goldstick: Your Honor—

"The Court: I have ruled on it.

"Do you have any other witnesses?

"Mr. Goldstick: No, I ask for an exception to your ruling.

"The Court: You have an exception all you want. You rest. You are out of witnesses. All right."

Apparently recognizing that petitioner could not possibly prevail without the testimony of his medical expert as to causation, respondent's counsel rested without calling any of the four witnesses he had indicated he would call in his pre-trial memorandum. In summation, respondent's counsel pointed out to the jury that:

> "There has been no testimony whatsoever to tie in or give you any reason, any causation, for his having lost his sense of taste and smell."

After only forty minutes of deliberation, the jury returned with a verdict for respondent.

Reasons for Granting the Writ

In this case, petitioner has been deprived of a valid cause of action because his medical expert witness could not abandon the patients he had scheduled for office visits in order to appear in Court on less than twenty-four hour's notice. This case, thus, presents an important question whether the Courts should make some reasonable effort to accommodate their busy schedules to the equally busy and important schedules of practicing physicians.

While medical testimony is a vital element in almost all personal injury cases, it is becoming increasingly difficult to persuade busy practitioners to serve as expert witnesses. See generally, Throckmorton, *Mutual Problems of Physicans and Lawyers in the Presentation of Medical Testimony,* 1965 Proceedings, ABA Section on Insurance, Negligence and Compensation Law 363. If the Procrustean rule adopted in this case, which grants no leeway to litigants in presenting the testimony of medical experts, is allowed to stand, it will be virtually impossible to get practicing physicians to testify in personal injury litigation in the Federal Courts. No practicing physican can be expected to agree to abandon his patients on a moment's notice in order to appear as an expert witness.

In order to appreciate fully the magnitude of the problem involved in this case, it is necessary to consider the world of uncertainty in which a trial attorney is forced to operate. Until the moment that his case is actually called for trial a trial attorney does not know with certainty when he will need to have his medical witness available. The

calendar history of the instant case provides a good example of this uncertainty. When on October 1, 1968 this case appeared on pre-trial calendar in the Law Journal it was in position No. 90. At this point counsel could only make an educated guess that the case might be tried near the end of the month. When on October 18, 1969, the case appeared as No. 40 on the trial calendar, counsel was still unable to fix with certainty the day on which the trial would begin and even when counsel received a call from the Clerk on October 22nd indicating that the case would probably begin the following day, counsel could not be certain that the case would in fact proceed to trial the following day. Moreover, counsel's ability to predict the time when the doctor's testimony would be necessary was further complicated by the uncertainties concerning the amount of time that would be required to select a jury and for the opening statements of trial counsel.

In light of this factual situation, it was clearly impossible for counsel to have subpoenaed the doctor to be in Court on the precise date when his testimony would be needed. The only way counsel could have been assured of the doctor's presence in Court when needed would have been by subpoenaing the doctor to appear in Court several days before the date that the trial might reasonably have been expected to commence and thereafter adjourning the subpoena from day to day until the acutal date of trial. Such a procedure would not only have unreasonably interfered with the doctor's practice but would unquestionably have prejudiced the doctor against petitioner and his attorney.

Yet, the facts of this case show that it would have been quite easy for the Court to have made a reasonable adjustment of its schedule to accommodate the busy private practitioner who had agreed to testify on petitioner's behalf, without wasting judicial time or unreasonably delaying the trial of this case.

Each of the parties indicated in the pre-trial order that the presentation of its case would take a full day. Thus, when at 4 o'clock in the afternoon petitioner's counsel announced that he had presented all of his evidence, except for the doctor who would be available at 1:30 p.m. the following afternoon, the court could have directed respondent to proceed with its case pending the arrival of petitioner's doctor.

While the question whether or not a continuance should be granted is one which rests in the discretion of the district court, this Court has recognized "That where it is manifest that there has been a plain abuse of discretion, the duty to correct arises." *Guardian Assurance Company of London* v. *Quintana,* 227 U.S. 100, 103-104; see also *Valdes* v. *Central Allagarcia, Inc.,* 225 U. S. 58, 73; Petitioner submits that in the circumstances of this case the action of the district judge in refusing even a five-minute continuance to allow plaintiff's counsel the opportunity to produce his medical expert constituted a clear abuse of discretion, which should be corrected by this court.

The suggestions of the court below that counsel could have avoided the problems of scheduling the doctor's testimony by taking his deposition before trial or by an application for an adjournment in the Calendar Part are un-

realistic.* In the first place, it seems unreasonable to place a burden on an injured seaman to bear the expense of a deposition of a medical expert witness when that doctor will be available at the time of trial. Moreover, since counsel knew that the doctor would be in New York City at the time of trial, there appeared no basis for the introduction of his deposition by the plaintiff under Rule 26(d) of the Federal Rules of Civil Procedure—the doctor was not unable to appear to testify, there was simply a problem of scheduling his testimony so that he would not have to abandon his patients. Similarly, the problem could not be solved by an application for an adjournment in Part I because counsel could not know until the case was assigned to a trial judge who fixed a definite time for the commencement of the trial, whether the doctor would be available at that time or whether some effort would have to be made to accommodate the doctor's schedule. Indeed, had counsel made such an application in Part I he would no doubt have been told that the question of scheduling the doctor's testimony should be taken up with the Judge to whom the case is assigned for trial.

The concern of the Courts for the expeditious disposition of cases is understandable in light of the present congestion of Court calendars. Yet, this Court has recognized in criminal cases that, "a myopic insistance upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar* v. *Sarafite,* 376 U. S. 575, 589. See also *Hintz* v. *Beto,* 379 F. 2d 937 (C. A. 5). Similarly, in Civil

---

* The relevant Calendar Rules of the United States District Court for the Southern District of New York are set forth as Appendix C, *infra.*

cases, the attempt to handle cases expeditiously should not be allowed to result in denying litigants the right to have their cases adequately presented to the jury. Here, petitioner was denied a meaningful day in Court because he was forced to submit his case to the jury without benefit of vital expert testimony, and was denied even a five minute recess to enable him to get the doctor to come to Court immediately. To say that such a result is justified in order to prevent congestion is to exalt the process of justice over the ends of justice.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID T. GOLDSTICK
Counsel for Petitioner

HALPERIN, SOMERS & GOLDSTICK

JOHN S. MARTIN, JR.
10 East 40th Street
New York, New York 10016

Of Counsel

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 581—September Term, 1968.

(Argued May 14, 1969 Decided September 3, 1969.)

Docket No. 33013

JAMES C. WINSTON,

Plaintiff-Appellant,

—v.—

PRUDENTIAL LINES, INC.,

Defendant-Appellee.

Before:

WATERMAN, SMITH and KAUFMAN, Circuit Judges.

Appellant, claiming gross abuse of discretion in denying him continuances he sought during a jury trial, appeals a judgment dismissing his complaint entered upon the jury verdict and order denying a motion for a new trial, United States District Court for the Southern District of New York, MacMahon, *J.* Judgment affirmed.

DAVID GOLDSTICK, Somers & Goldstick, New York City, *for Plaintiff-Appellant.*

JOHN J. PURCELL, Lilly, Sullivan & Purcell, New York City, *for Defendant-Appellee.*

PER CURIAM:

Plaintiff commenced this action against the defendant shipowner seeking to recover damages for personal injuries he claimed were caused when he was employed as an unlicensed Junior Engineer on defendant's vessel. This alleged injury was a permanent loss of taste and smell. The plaintiff's claim was that an exposure to hydrochloric acid fumes under circumstances demonstrating the shipowner's negligence was the cause of the injury.[1] The only person competent to testify for plaintiff with reasonable medical certainty that the injury resulted from the exposure was the plaintiff's medical witness.

The case had been on the Ready Day Calendar of the Southern District of New York since October 16, 1968, and on October 23 the attorneys for the parties received final telephone notice that trial would commence on the following day. Although plaintiff was not in New York and could not appear in person, plaintiff's counsel made no motion to take the case off the trial calendar and stated he was prepared to start at 1:30 P.M. on October 24 by reading plaintiff's deposition into evidence. Before doing so, although at the same time insisting that he was ready to go to trial, he requested that he be permitted to put his doctor on the stand at 1:30 the following afternoon and, if all other evidence were closed before that hour, that he be granted a continuance until then for that purpose. The

1. The Public Health Service records were introduced into evidence solely for the purpose of the diagnosis of "Loss of taste and smell, etiology unknown; possibly secondary to acid exposure." The ship's medical record was also in evidence. The exposure occurred on October 30, 1963. Injury was reported October 31. When the ship docked on November 12 appellant immediately went to the U. S. Public Health Service and received P.H.S. treatment as an outpatient from November 15, 1963 to June 4, 1964.

application was denied by the trial judge, Judge MacMahon, a jury was impaneled and sworn, and the trial began. Except for the doctor's testimony plaintiff's case was concluded by 4 P.M. and counsel again moved for a continuance until 1:30 P.M. of the following day. The request was refused. Counsel then requested a five-minute adjournment for the purpose of telephoning the doctor. This request was refused and the plaintiff was required to rest his case. The defendant forthwith rested without putting in any evidence, the case was immediately submitted to the jury, and before 6 P.M. the jury returned a verdict dismissing plaintiff's complaint. Claiming that the denial of the continuance motions grossly prejudiced his case plaintiff's counsel moved to set aside the verdict and for an order directing a new trial. Judge MacMahon denied this post-verdict motion and he entered judgment on the jury verdict.

Appellant concedes that a federal trial judge has broad discretion in granting or denying a request for short continuances during the course of a trial. *Peckham* v. *Family Loan Co.*, 262 F. 2d 422 (5 Cir. 1959). Appellant argues, however, that there was an abuse of discretion in this case, and it most assuredly appears that his argument is far from a frivolous one. Nevertheless, we are acutely aware of the serious calendar problem which exists in the Southern District of New York and we recognize that Judge MacMahon is one of the district's most zealous judges in moving that calendar. See, *e.g.*, *Vitarelle* v. *The Long Island Rail Road Co.* (2 Cir. July 22, 1969).

We have stated that:

> "* * * We will not interfere with the conscientious Judge who will not accept the status quo of calendar

> congestion. The task of updating calendars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment *wisely* in achieving the desired goal." (Emphasis added.) *Davis* v. *United Fruit Co.*, 402 F. 2d 328, 331-332 (2 Cir. 1968).

Thus we have permitted a great deal of latitude to be given to individual district judges who conscientiously labor to reduce calendar congestion, but we have hoped that in the utilization of this discretionary latitude the judges should also bear in mind that tight docket control, although a vital part of efficient judicial administration, is not an end in itself. The purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired. As we clearly stated in *Davis, supra,* "a court must not let its zeal for a tidy calendar overcome its duty to do justice." *Id.* at 331. In the present case, had any one of us been the trial judge, each of us might well have made somewhat different dispositions of plaintiff's two motions for half-day continuances (or, in any event, the five-minute request) than the dispositions Judge MacMahon chose to make; but as reviewing judges we are unwilling to hold that Judge MacMahon's decisions were so unreasonable as to be abuses of a trial judge's discretion. We rule thus the more readily for we point out that plaintiff's counsel had two obvious ways open to him by which he could have protected his case. First, realizing that his medical witness might not be available at all times, counsel could have taken the doctor's deposition. Indeed, his client's deposition was taken and he was no doubt aware of the consequences to his case if that deposition were not available. *Davis* v. *United Fruit Co., supra.*

Second, if counsel knew that his witness might not be available on the day set for trial he could have moved for relief prior to trial under Calendar Rule 7(b)(1) of the Southern District of New York rather than insisting that he was ready. The Rule provides in part that:

> When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. * * * Such applications must be made in the event that by reason of engagement or illness of counsel, *unavailability* or illness *of witnesses,* or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make whatever disposition is necessary in the interests of justice. * * * (Emphasis added.)

Counsel having failed to adopt either of these possible avenues of relief as a hedge against the likelihood that his witness might not be available when needed, we affirm the judgment below and hold that plaintiff must bear the unfortunate consequences of having the merits of his case submitted for jury resolution without the benefit of the testimony of his medical witness.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of September one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
Hon. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN, Circuit Judges.

JAMES C. WINSTON,
Plaintiff-Appellant,

v.

PRUDENTIAL LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

APPENDIX C

S.D.N.Y. CAL. RULE 5(a):

> A party desiring to place a cause upon the trial calendar may file with the clerk, with proof of service thereof upon the attorneys of all parties who have appeared, a note of issue signed by an attorney of record stating: * * *
>
> (8) That the parties have taken, or have had reasonable opportunity to take and complete necessary depositions and other discovery proceedings; * * *
>
> (10) That the cause is in all respects ready for trial; * * *

S.D.N.Y. CAL. RULE 7(b)(1):

> When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. The application shall be in writing; it shall be filed with the clerk for calendars; served upon the other parties, and shall be returnable before the Part 1 Judge and shall be heard by him promptly. Such applications must be made in the event that by reason of engagement or illness of counsel, unavailability or illness of witnesses, or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make

whatever disposition is necessary in the interests of justice.

Attorneys who fail to apply to the Part 1 Judge as provided above and who are unable to proceed to trial when assigned shall be subject to sanctions as provided in Rule 16.